

The Catholic Lawyer

Volume 27
Number 4 *Volume 27, Autumn 1982, Number 4*

Article 2

September 2017

Constitutional Crisis

Sen. Daniel Patrick Moynihan

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Sen. Daniel Patrick Moynihan (1982) "Constitutional Crisis," *The Catholic Lawyer*. Vol. 27 : No. 4 , Article 2.
Available at: <https://scholarship.law.stjohns.edu/tcl/vol27/iss4/2>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

CONSTITUTIONAL CRISIS

SEN. DANIEL PATRICK MOYNIHAN*

Soon after the 97th Congress convened, the American Bar Association (ABA) appeared before the Senate Judiciary Committee. The ABA representative testified that proposed legislation that would strip the federal courts, including the Supreme Court, of jurisdiction over various subject matter was both politically unwise and of questionable constitutional validity.¹ More emphatically, David Brink, the president of the ABA, stated:

[W]e are confronted at this very moment with a legislative threat to our nation that may lead to the most serious constitutional crisis since our great Civil War.²

* This Article is adapted from an address delivered to the graduating class of the St. John's University School of Law, in New York, on June 6, 1982.

¹ *Constitutional Restraints Upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 136 (1981) (statement of Edward I. Cutler, Chairman, Special Committee on the Coordination of Federal Judicial Improvements, American Bar Association) [hereinafter cited as *Hearings*]. Chairman Cutler observed that the bills introduced in the House and Senate would strip federal courts of jurisdiction in such controversial areas as "abortion, busing, prayer in public schools and other public buildings, and male-only draft registration." *Id.* at 227. Comparing these bills to the Jenner-Butler Bill, S. 2646, 85th Cong., 2d Sess. (1958), which would have removed from the Supreme Court's appellate jurisdiction five specific types of cases, he emphasized that the position of the ABA had not changed: the organization still "oppose[d] changing constitutional jurisprudence through jurisdictional legislation." *Hearings, supra*, at 227.

Mr. Cutler discussed a number of policy and constitutional arguments against the recent proposals. He contended that jurisdictional legislation, when used to thwart the "deliberately onerous" requirements of the constitutional amendment process ignores the concerns of the framers of the Constitution. *Id.* To provide state and federal trial judges with "unreviewable power to decide basic constitutional issues," Chairman Cutler further argued, would result not only in "diverse local interpretations and practices under the Constitution" but also in the nullity of the supremacy clause. *Id.*

² N.Y. Times, Jan. 25, 1982, at A19, col. 4, reprinted in 128 CONG. REC. S401 (daily ed. Feb. 4, 1982). Six months prior to Brink's statement, the ABA's house of delegates "adopted a resolution opposing the 'legislative curtailment of the jurisdiction of the Supreme Court of the United States or the inferior federal courts for the purpose of effecting changes in constitutional law.'" Editorial Opinion and Comment, *Backdoor Amendment*, 67 A.B.A. J.

One such measure has already passed the Senate, and by an imposing margin.³ Other bills are being "marked up" and reported out, while others are already on the calendar.⁴ The proponents of such legislation are growing more confident, and rightfully so, since the tenor of Congress appears to be in their favor. Moreover, the judiciary, the "least dangerous branch,"⁵ is silent in obedience to its custom and to its constitutional role.⁶ Perhaps a stand on behalf of the Court and the Constitution taken

1082, 1082 (1981).

³ See S. 951, 97th Cong., 2d Sess., § 2.5 (1981), 128 CONG. REC. S393 (daily ed. Feb. 4, 1982). Senate bill 951 authorizes appropriations for the Justice Department in fiscal year 1982. Senator Jesse Helms offered as a rider to this bill amendment number 69, which later became section 2.5 of the bill, and is referred to as the Neighborhood School Act of 1981. See *id.* This section provides:

No court of the United States may order or issue any writ directly or indirectly ordering any student to be assigned or to be transported to a public school other than that which is closest to the student's residence unless [certain specified circumstances exist].

Id.

⁴ See *infra* note 26.

⁵ Alexander Hamilton once stated:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in capacity to annoy or injure them. . . . The judiciary . . . has no . . . direction either of the strength or the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

THE FEDERALIST No. 78, at 490 (A. Hamilton) (H. Jones ed. 1961).

⁶ Article III of the Constitution limits the Supreme Court's decisional power to "cases and controversies." U.S. CONST. art. III, § 2, cl. 1. The Court, in addition, has developed a policy of strict necessity in disposing of constitutional issues before it. *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947). Some members of the federal and state judiciaries, however, have assumed a more active role and have spoken out against jurisdiction-curtailling bills. Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit has stated that these bills threaten "not only a number of individual liberties, but also the very independence of the Federal courts, an independence that has safeguarded the rights of American citizens for nearly 200 years." N.Y. Times, Sept. 20, 1981, § 6 (Magazine), at 44. In addition, the Conference of Chief Justices has expressed its concern over jurisdiction-stripping legislation and its impact on state courts by adopting a resolution in January, 1982. See Editorial Opinion and Comment, *The Chiefs Speak*, 68 A.B.A. J. 386, 386 (1982). This resolution criticizes congressional tampering with the nation's judicial system for several reasons, the first of which is the apparent premise that state court judges will not fulfill their oaths of office to honor the United States Constitution nor give full force to controlling precedents of the Supreme Court. *Id.* Second, the resolution warns that without the appellate jurisdiction of the Supreme Court, a wide divergence in state court decisions could result. Third, the pending legislation expresses no method for state courts to declare federal laws unconstitutional, *id.*, and, therefore, renders uncertain how Congress would react given a situation where a majority of the states' courts find a federal law violative of the Constitu-

by the Justice Department will change this imbalance.⁷

Simply stated, the Supreme Court often is wrong in the sense that having decided an issue it subsequently declares its decision to be incorrect. The Court then either modifies its opinion or in some cases overrules its prior decision.⁸ With respect to important issues, changes usually occur over one⁹ or two¹⁰ generations, since these changes are often cultural

tion. Fourth, the resolution states that the proposed bills would create confusion concerning enforcement of federal law by state courts, as well as what actions state courts may take against federal officers. *Id.* Fifth, the Supreme Court holdings targeted by the legislation would be rendered unchangeable absent constitutional amendments. *Id.* Finally, the legislation would increase substantially the already heavy caseload of state courts. *Id.*

⁷ Since Senator Moynihan's address, President Reagan has spoken out in favor of two jurisdiction-stripping measures, one on school prayer, S. 1248, 97th Cong., 2d Sess. (1982), and one on abortion, S. 1251, 97th Cong., 2d Sess. (1982). Larry Speakes, the deputy White House press secretary stated that the Administration would "not oppose the bill" on school prayer. N.Y. Times, Sept. 9, 1982, at A1, col. 2. In addition, President Reagan called this jurisdiction-stripping measure a "reasonable statutory approach to one of the most sensitive problems our society faces—the taking of the life of an unborn child." *Id.* at A18, col. 1.

Attorney General William French Smith, however, stated that it is "undesirable for Congress to make 'exceptions' to Supreme Court jurisdiction in the 'core functions' of the court 'as an independent and equal branch in our system of separation of powers.'" *Id.* at A1, col. 2.

⁸ Compare *Plessy v. Ferguson*, 163 U.S. 537 (1908) with *Brown v. Board of Educ.*, 347 U.S. 483 (1954). For a noted constitutional law scholar's discussion of Supreme Court errancy, see Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 229 (1973) ("there have been occasions when opinions of constitutional interpretation by the Supreme Court have been extremely unpopular, doubtless even wrong, and unjust").

⁹ Compare *Lochner v. New York*, 198 U.S. 45, 61 (1905) with *Nebbia v. New York*, 291 U.S. 502, 502 (1934). In *Lochner*, the Supreme Court held that a New York statute forbidding employment in a bakery for more than 60 hours per week or 10 hours per day was unconstitutional under the fourteenth amendment. According to the Court, New York had enacted a statute that was "an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts." *Lochner*, 198 U.S. at 61. Twenty-nine years later in *Nebbia*, the Court changed its opinion regarding the effect of the fourteenth amendment on such legislation, upholding a state statute that allowed a milk control board to set minimum and maximum prices for milk. *Nebbia*, 291 U.S. at 502.

¹⁰ In *Plessy v. Ferguson*, 163 U.S. 537 (1890), a man who asserted that he "was seven-eighths Caucasian and one-eighth African blood, that the mixture of colored blood was not discernible in him, and that he was entitled to every . . . right . . . of the white race," *id.* at 541, was arrested for refusing to vacate a seat in a railway passenger coach that was reserved for whites, *id.* at 541-42. *Plessy* challenged the constitutionality of the statutory scheme behind this requirement as violative of the thirteenth and fourteenth amendments. The Court, however, upheld the laws, stating that the absence of conflict with the thirteenth amendment was "too clear for argument," *id.* at 542, and that the fourteenth amendment "could not have been intended to abolish distinctions based upon color, or to enforce social . . . equality," *id.* at 544.

In *Brown v. Board of Educ.*, 347 U.S. 483 (1954), the Court was presented with various states' statutes that required or permitted segregation in public schools as long as the facili-

as well as legal. On the other hand, the Court may reverse itself within the space of a year, as it did in *United States v. Ross*.¹¹ At various points in American history, and sometimes for extended periods, the Court has been "wrong" about one of the principal constitutional issues of the day, and has subsequently reversed itself, admitting in effect that it has been in error.¹²

There is a process by which one can secure a Supreme Court reversal of one of its decisions. There is a simple hierarchy of responses to what one does when one thinks the Supreme Court is wrong. In one combination or another, these responses have commonly led the Court to change its position. The Court does respond to positions reasonably propounded. It has been suggested that one such approach is a hierarchy of advocacy consisting of debate,¹³ legislation,¹⁴ and litigation.

ties were equal for both races. The Court held that such statutes violated the equal protection clause of the fourteenth amendment because "[s]eparate educational facilities are inherently unequal." *Id.* at 495. In overruling *Plessy*, the Court stated that state-enforced segregation "generates a feeling of inferiority as to . . . [the black's] status in the community . . . in a way unlikely ever to be undone." *Id.* at 494.

¹¹ 102 S. Ct. 2157 (1982). The *Ross* holding was inconsistent with an opinion the Court handed down less than 12 months earlier in *Robbins v. California*, 453 U.S. 420 (1981). In *Robbins*, during the course of a highway stop, one of the investigating officers smelled marijuana smoke when the defendant opened the car door. When the driver, Robbins, was searched, a vial of liquid was found. In addition, the officers found a totebag and two packages in the trunk that contained 15 pounds of marijuana. Robbins, charged with various drug offenses, moved at his pretrial hearing to suppress the evidence found in the packages. The motion was denied, however, and Robbins was convicted. On certiorari, a plurality of the Court concluded that, unless the contents of a closed container found in an automobile are in plain view, the fourth amendment prohibits intrusion without a warrant. *Id.* at 428-29.

In the *Ross* case, a police informant telephoned a member of the District of Columbia Police Department with information that a person known as "Bandit" (Ross) had just completed a narcotics sale, and that additional drugs were in the trunk of Bandit's automobile. 102 S. Ct. at 2161. Two officers went to the location given by the informant, and spotted Bandit. During a warrantless search of the car's interior, glove compartment, and trunk, the officers found a pistol, a brown paper bag and a red leather pouch. Both the bag and pouch were opened; the bag contained heroin, the pouch, \$3,200. The state district court denied a motion to suppress these two items and convicted Ross of possession with intent to distribute, but the court of appeal reversed. On appeal, the Supreme Court upheld the right of police to search without a warrant luggage or packages found in an automobile, provided the police had probable cause to believe that contraband was concealed somewhere within the automobile. *Id.* at 2172.

¹² See *supra* notes 9-11 and accompanying text.

¹³ In this context, "debate" means a full, public discussion of a Supreme Court decision. It is the author's view that if such a debate produces an "unmistakable wave of public sentiment," R. McCloskey, *THE AMERICAN SUPREME COURT* 23 (1960), the Court's opinions ultimately will reflect the consensus of national opinion. Moynihan, *What Do You Do When the Supreme Court is Wrong?*, 57 *PUB. INTEREST*, Fall, 1979, at 19, 21.

¹⁴ "Legislation" is used to mean the introduction and passage of laws as a direct way for the

Briefly, this hierarchy, in effect, means that issues upon which the Court has ruled would remain vital in public forums; debate would continue on the same question. Variations of the originally contested law would be enacted by legislators who thought the Court was wrong. The laws would then be challenged in the lower courts, and would eventually again come before the Supreme Court, which might have already changed its position. If the Court was not already convinced and if it ruled again that legislators had written an unconstitutional law, the solution would be to draft yet another law to the same effect. Changed social circumstances, a differently or better argued case, or a new Justice might lead to a favorable ruling.¹⁵ It is hoped that those who disagree with one of the Court's decisions would remember that the Court can change its mind and that there is a legitimate and time-tested way to get it to do so. Unfortunately, in the past 3 years, the great many people who have decided that they do not agree with the Supreme Court have rejected the concept of debate, legislate, and litigate. They have embarked upon a completely new and quite dangerous course of action. The emerging triumvirate hierarchy preaches to convene,¹⁶ overrule¹⁷ and restrict.¹⁸ Perhaps the most

executive and legislative branches to apprise the Court of their reading of the Constitution. Thus, if Congress and the President disagree with a holding of the Supreme Court, they may make this known to the Court by changing the law. For example, when Congress disagreed with the Court's holding in *Helvering v. Bruun*, 309 U.S. 461 (1940), Congress responded by adopting the provisions now found in sections 109 and 1019 of the Internal Revenue Code. See Revenue Act of 1942, ch. 619, § 115, 56 Stat. 798 (now I.R.C. §§ 109, 1019 (1982)).

¹⁵ The replacement of one or more Supreme Court Justices has led to the alteration of prior decisions. For example, after the appointment of Justices Burger, Blackmun, Powell, and Rehnquist, the Court modified the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), which required that, prior to interrogation, persons taken into police custody be given specific warnings regarding their constitutional rights. In *Harris v. New York*, 401 U.S. 222 (1971), the Court ruled that a statement which would be inadmissible because of a failure to warn the suspect of his rights, could be used where the subject later chooses to testify, and the testimony contradicts the statement. *Id.* at 225-26.

¹⁶ As used here, "convene" means the calling of a constitutional convention for the purpose of changing the effects of decisions of the Supreme Court. Pursuant to article V of the Constitution, the convention mechanism is put into effect upon application to Congress by two-thirds of the states. See U.S. CONST. art. V. As a response to certain Court decisions during the 1960's, petitions calling for a convention to propose an amendment that would remove apportionment cases from federal jurisdiction began to pour into Congress. See Connelly, *Amending the Constitution: Is This Any Way to Call for a Constitutional Convention?*, 22 ARIZ. L. REV. 1011, 1016 n.51 (1980).

¹⁷ "Overrule" means the passage of legislation designed to vitiate a particular Court ruling. One area in which Congress has sought to nullify the Court's decisions is bussing. As early as 1972, congressional bills have been advanced, aimed at limiting the federal courts' power to issue and enforce bussing orders. See, e.g., S. 3395, 92d Cong., 2d Sess. (1972); H.R. 13,915, 92d Cong., 2d Sess. (1972). See generally *Proposed Amendments to the Constitution and Legislation Relating to Transportation of Public School Pupils: Hearings on H.R.*

pernicious of these is the attempt to restrict federal jurisdiction. While such a course is colorably constitutional (at least in the case of inferior courts)¹⁹ it is profoundly at odds with our nation's customs and political philosophy.

It is commonplace that pure democracy is characterized by majority rule and minority rights.²⁰ Our Constitution vests majority rule in the legislative²¹ and executive branches, while the judiciary protects the rights of the minority.²² It is the legislature that makes the laws; the executive that enforces them; and it is the courts that interpret the laws and determine whether they conform to the Constitution.²³ This notion of judicial review has been part of our heritage for nearly 200 years.²⁴

In order for the Court to interpret the law it must decide cases. If it

13,915 *Before the Subcomm. No. 5 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. (1972).

¹⁹ "Restrict" refers to the removal of all or some of the federal courts' jurisdiction to provide particular remedies or decide particular cases. See *supra* note 1.

²⁰ See *infra* text accompanying note 40.

²¹ See 5 THE WRITINGS OF JAMES MADISON 269 (J. Hunt ed. 1904), quoted in J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 60-61 (1980). Madison wrote that "in our Government the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents." *Id.*

²² THE FEDERALIST No. 39 (J. Madison) (H. Jones ed. 1961). Majority rule is vested in Congress by article I of the Constitution. Members of the House of Representatives are "made directly elective by the people for brief terms and under minor property restrictions," J. CHOPER, *supra* note 20, at 6-7 (quoting R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 9-10 (1971)), and Senators are chosen indirectly by the people for longer terms, see U.S. CONST. art. I, § 2, cl. 3; *id.* § 3, cl. 2.

²³ In *Chambers v. Florida*, 309 U.S. 227 (1940), Justice Black stated that the federal courts "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement." *Id.* at 241; see J. CHOPER, *supra* note 20, at 167-68; Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498, 533 (1974); Redish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45, 76-79 (1975).

²⁴ *TVA v. Hill*, 437 U.S. 153, 194 (1977). The *Hill* Court stated:

Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," . . . it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

Id. (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

²⁴ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

cannot hear certain cases, then it cannot protect certain rights. As cases produce winners and losers, the ideas and principles upon which the cases rely produce supporters and opponents.²⁵ It is only natural that those against whom rulings are rendered seek to prevent these rulings by either denying the courts the power to decide, or by denying litigants certain kinds of relief.²⁶

Currently there are thirty-two "court-curbing bills" pending in the 97th Congress which would deny federal courts the authority to hear cases on a variety of issues.²⁷ The Senate already has adopted a measure that limits the authority of the lower federal courts.²⁸ These bills are troublesome because arguably they are constitutional.²⁹ Indeed, the juris-

²⁵ One case producing both supporters and opponents was *Engle v. Vitale*, 370 U.S. 421 (1962). The opponents proposed more than 50 constitutional amendments designed to overrule the decision, while some members of Congress proposed the popular election of Supreme Court Justices, as well as a limited term on the Court. Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 50 & n.76 (1962).

²⁶ An example of a bill that would deny the federal courts all jurisdiction on an issue is H.R. 867, 97th Cong., 1st Sess., 127 CONG. REC. H116 (daily ed. Jan. 16, 1981). It "would remove the jurisdiction of both the Supreme Court and the lower federal courts in cases arising out of either any 'State statute, ordinance, rule, regulation, or any other part thereof' which relates to abortion or any 'Act interpreting, applying or enforcing' any such state act." Committee on Federal Legislation, *Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review*, 36 REC. A.B. CITY N.Y. 557, 558, 564 (1981). Senate bill 951, S. 951, 97th Cong., 2d Sess. (1981), 128 CONG. REC. S393 (daily ed. Feb. 4, 1982) is a bill that would limit only the ability of federal courts to fashion relief. It limits the circumstances under which bussing may be ordered, as well as the length of the bus ride, and requires that alternative measures be explored before such an order is issued. See *id.*

²⁷ See, e.g., S. 1741, 97th Cong., 2d Sess., 127 CONG. REC. S11, S14 (daily ed. Oct. 15, 1981). Introduced by Senator Helms, Senate bill 1741, if enacted, would eliminate the jurisdiction of lower federal courts to issue any order in any case involving a state or local statute that protects the rights of persons between conception and birth, limits or regulates abortion, or provides funding or other assistance for abortions. This bill, however, declares that it shall not deprive the Supreme Court of authority to render appropriate relief in any case. In addition, the bill provides that, for purposes of the due process clause of the fourteenth amendment, human life exists from conception and "person" includes all human beings.

²⁸ S. 951, 97th Cong., 1st Sess., § 2.5 (1981), 128 CONG. REC. S393 (daily ed. Feb. 4, 1982).

²⁹ See *Constitutional Restraints Upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 32 (1982) (statement of Prof. Paul M. Bator, Harvard University) [hereinafter cited as Bator, *Constitutional Restraints Upon the Judiciary*]; *id.* at 89 (statement of Prof. Martin H. Redish, Northwestern University). Professor Redish is of the view that congressional authority over the federal courts' jurisdiction is plenary. *Id.* at 85. Professor Bator maintains, however, that "the power of Congress to regulate jurisdiction cannot be exercised in a manner which violates some other constitutional rule." Bator, *Constitutional Restraints Upon the Judiciary*, *supra*, at 34. For example, Congress is not free to draw jurisdiction-curbing legislation along racial or religious lines. *Id.* See generally Redish & Woods, *supra* note 22, at 67-73; Note, *Limitations on the Appellate Jurisdiction of the Supreme Court*, 20 U. PITT. L. REV. 99, 115 (1958).

diction of the Supreme Court, set out in article III of the Constitution, specifically allows for exceptions and regulations by Congress.³⁰

The plain meaning of this penultimate "exceptions" clause is that Congress may, by statute, set boundaries for the Supreme Court's appellate jurisdiction.³¹ In *Ex parte McCardle*,³² the Court itself *seemingly* bowed to the authority of the legislature.³³ Some have suggested that *McCardle* was not truly a test of Congress' power in the area of jurisdiction since that case merely altered the manner in which a habeas corpus question could be brought before the Court and it in no way questioned the Court's ability to hear the case.³⁴ Nevertheless, it is frequently cited as the leading case in this area by those who would have Congress restrict the jurisdiction of the Court.³⁵

³⁰ The Constitution gives the Supreme Court appellate jurisdiction "with such exceptions, and under such regulations as the Congress shall make" over all cases within the judicial power of the United States originating in state or lower federal courts. U.S. CONST. art. III, § 2. "Article III of the Constitution defines the judicial power of the United States, creates the Supreme Court, and identifies the jurisdiction of that Court." *Constitutional Restraints Upon the Judiciary: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 13 (1982) (statement of Prof. Leonard G. Ratner, University of Southern California) [hereinafter cited as Ratner, *Constitutional Restraints Upon the Judiciary*].

³¹ Jurists have, perhaps reluctantly, acknowledged Congress' power to limit federal jurisdiction. Before the close of the 18th century, Justice Samuel Chase observed that "the political truth is, that the disposal of the judicial power [except in a few specified instances] belongs to [C]ongress. If [C]ongress has given the power to this Court, we possess it, not otherwise." *Turner v. Bank of North Am.*, 4 U.S. (4 Dall.) 8, 10 n.1. (1799). Justice Grier, in the mid-19th century, stated that "[c]ourts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Finally, in 1943, Chief Justice Stone declared: "The Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction . . . and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (quoting *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

³² 74 U.S. (7 Wall.) 506 (1868).

³³ *McCardle*, a civilian convicted by a military commission for obstructing reconstruction, contested the constitutionality of certain reconstruction acts. He appealed the circuit court's denial of habeas corpus to the Supreme Court, a procedure authorized by an 1867 statute. After a government motion to dismiss the appeal was denied, and before a decision on the merits, Congress, fearing that the Court was about to invalidate the reconstruction acts, repealed that portion of the 1867 act authorizing such appeals. The Court upheld the exercise of congressional power and dismissed the appeal. 74 U.S. (7 Wall.) at 507; see *infra* text accompanying notes 34-35.

³⁴ Although the *McCardle* Court refused to proceed with the case because it no longer had jurisdiction of the appeal as granted under the act of 1867, it noted that the "whole appellate power of the court, in cases of habeas corpus," was not totally repealed. 74 U.S. (7 Wall.) at 515.

³⁵ See generally Anderson, *Government of Courts: The Power of Congress Under Article III*, 68 A.B.A.J. 686, 686-89 (1982); Van Alstyne, *supra* note 8, at 232.

We must presume, however, from the presence of the supremacy clause that the Constitution's framers intended that there should be but a single arbiter of this supreme law, rather than the anarchy of a separate interpretation by each state's highest court. If there were not to be a single supreme tribunal authorized to interpret and pronounce the meaning of the Constitution and of federal law, the supremacy clause would be rendered meaningless.³⁶ Thus, there is the notion that the Court has certain "essential functions" under the Constitution and that any power the national legislature might have to limit jurisdiction is itself limited.³⁷ It appears uncertain, however, whether the Supreme Court's appellate jurisdiction is subject to the will of Congress. *Ex parte McCordle*, a leading but rather old case, suggests that Congress possesses such power.³⁸ It would be fair to say, however, that most modern commentators believe that Congress does not.³⁹

³⁶ In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall noted that the federal judiciary was "supreme in the exposition of the law of the Constitution," as well as a respected, "permanent, and indispensable feature" of the constitutional system. *Id.* at 177. Indeed, he stated: "If the legislatures of the several states may, at will, annul the judgments of the Courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery" *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809) (emphasis added).

³⁷ See generally Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 *Geo. L.J.* 839, 866-67 (1976) ("proper test of constitutionality is whether the withdrawal [of the federal courts jurisdiction] affects substantive constitutional rights"). Professor Ratner suggests that "[r]easonably interpreted the [exceptions] clause means 'With such exceptions and under such Regulations as Congress may make, not inconsistent with the essential functions of the Supreme Court under this Constitution.'" Ratner, *Constitutional Restraints Upon the Judiciary*, *supra* note 30, at 19. Such an interpretation is supported by action taken at the Constitutional Convention during consideration of the exceptions and regulations clause. See 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 431 (1911). Also, a motion that purported to delineate expressly the Court's jurisdiction read: "In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct." This proposed amendment was defeated by a vote of six to two. *Id.* On this basis, Professor Ratner reasons, the Convention did not intend to confer upon Congress plenary control over the Court's jurisdiction. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 *U. PA. L. REV.* 157, 173 (1960).

³⁸ See *supra* text accompanying notes 32-35. One commentator has suggested that the *McCordle* Court should have ignored the 1868 Repealer Act since the Court already had taken jurisdiction, or at least should have held the act ineffective as to *McCordle* since the enactment took effect after argument of the case. By adopting either of these positions, the commentator maintains, the Court "would have avoided inflicting upon itself the fateful holding of its jurisdictional subordination to the will of Congress." Van Alstyne, *supra* note 8, at 244.

³⁹ See, e.g., Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 *OR. L. REV.* 3, 5 (1973); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 *HARV. L. REV.* 1362, 1401 (1953); Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 *MINN. L. REV.* 53, 68-69

Nevertheless, the claim that Congress makes on the jurisdiction of lower courts is, perhaps, clearer. Congress is given absolute discretion by the Constitution to establish lower federal courts and by implication the power to control the jurisdiction of the courts that it creates.⁴⁰ There are those who would disagree.⁴¹ They would maintain that due to the proliferation of federal law and the dramatic increase in federal court caseloads since the first lower federal courts were established in 1789, these courts have become a constitutional necessity. The burden of harmonizing conflicting interpretations of federal law by the fifty state court systems and vindicating federal rights would be more than the Supreme Court's appellate jurisdiction could bear.⁴² Others have said that the federal courts constitutionally are necessary to bar unconstitutional acts by federal officials since state courts generally are without the power to afford relief in such cases.⁴³

(1962); Van Alstyne, *supra* note 8, at 244-54.

⁴⁰ Article III of the Constitution provides: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. Professor Bator maintains that "the question of access to the lower federal courts as a way of assuring the effectiveness of federal law should not be made a matter of constitutional principle." Rather, he posits, it "should be left a matter of political and legislative judgment to be made from time to time in light of particular circumstances." Bator, *Constitutional Restraints Upon the Judiciary*, *supra* note 29, at 33.

⁴¹ Practical considerations have led one commentator to conclude:

The lower federal courts are . . . indispensable if the judiciary is to be a co-equal branch and if the "judicial power of the United States" is to remain the power to protect rights guaranteed by the Constitution and its Amendments. Abolition of the lower federal courts is no longer constitutionally permissible . . . the jurisdiction of these courts is not a matter solely within the discretion of Congress.

Eisenberg, *supra* note 22, at 533; see 3 J. STORY, COMMENTARIES ON THE CONSTITUTION §§ 1584-1590 (1970).

⁴² See Eisenberg, *supra* note 22, at 510-13.

As federal caseloads grew . . . lower federal courts became necessary components of the national judiciary if the constitutional duty of case by case considerations of all federal cases was to be fulfilled. It can now be asserted that their existence in some form is constitutionally required.

Id. at 513 (footnote omitted). Compare Freund, *Why We Need the National Court of Appeals*, 59 A.B.A. J. 247, 250 (1973) with Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 474-76 (1973).

⁴³ In 1821, the Supreme Court denied a state court the power to issue a writ of mandamus upon a federal officer. See *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821). The Court's major pronouncement against state court interference with the operation of the federal government came after the Civil War in *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871). The removal of state court jurisdiction over federal officials was considered necessary by the Court to insure uniformity of interpretation of federal laws and to prevent local prejudices from being embedded in federal laws. *Id.* at 407-08. See generally Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385, 1386 (1964); Bishop, *The Jurisdiction of State and Federal Courts Over Federal Officers*, 9 COLUM. L. REV. 397, 406-08

In essence, we still do not definitely know the scope of the powers of Congress in this area. The legislature has repeatedly, and without serious challenge, exercised its power to decide what the lower courts' jurisdiction should be in organizational or administrative matters.⁴⁴ It has never tried to say, however, that certain outcomes would not be tolerated or that certain cases, rather than classes of cases, could not be heard.⁴⁵

On October 29, 1981, Attorney General William French Smith spoke before the Federal Legal Council in Reston, Virginia. It had been hoped that the Attorney General had come to accept the traditional hierarchy of debate, legislate, litigate,⁴⁶ and would thus seek passage of laws that would bring before the courts those issues that he wished to have decided differently, and argue in court for the changes he desired. It now appears, however, that he had something quite different in mind. He has endorsed the constitutionality of the Department of Justice authorization bill that limits the power of lower federal courts to order bussing.⁴⁷ Although it was clearly his duty to inform us as to his belief on the legislation's constitutionality, the Attorney General of the United States has another duty as well: the duty to advise on the prudence and the wisdom of matters touching on the Court, of which he must be the first defender.⁴⁸ While this legislation might be consistent with the Constitution, we must ask ourselves, *Should* it be? The ABA considers the bill the greatest constitutional crisis since the Civil War.

In the course of the debate on Senate bill 951, it was stated that the Supreme Court has been thought to be wrong. Our constant obligation to the Court, however, is not to agree with it but to obey it. We should not attempt to deny the Court its most fundamental function: to decide matters that are brought before it. To say that there are matters that the Court may not consider is to say that it is less than a court, much less a Supreme Court. It is tantamount to stating that the Court acts at the toleration and on the terms set by Congress which, in effect, becomes the

(1909).

⁴⁴ Congress has on numerous occasions altered the jurisdictional amount required for federal court review. For example, in 1958 Congress raised the jurisdictional amount for federal question disputes from \$3,000 to \$10,000. Act of July 25, 1958, Pub. L. No. 85-554, § 1(a), 72 Stat. 415. A 1976 amendment, Act of Oct. 21, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721, eliminated the \$10,000 jurisdictional amount where the action was brought against the United States, or any agency, officer, or employee of the United States. Finally, the Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(b), 94 Stat. 2369, abolished the minimum amount in controversy requirement of \$10,000 for original jurisdiction in federal question cases.

⁴⁵ See *supra* note 30.

⁴⁶ See *supra* text accompanying notes 8 & 13-14.

⁴⁷ See *supra* note 26. But see *supra* note 7.

⁴⁸ See generally 28 U.S.C. §§ 501-526 (1976).

supreme arbiter of what may and may not be judged. At that point, a profound constitutional transmogrification takes place, making us no longer the same Republic.⁴⁹

For nearly 200 years, this country for the most part has succeeded in resolving its political disputes in a manner that left adversaries feeling that they had been treated fairly. This is due to a cognizance of certain fundamental aspects of our political structure. First, decisions on important issues are not reached without coming to a national consensus.⁵⁰ There is no attempt to overpower the opposition since the membership of the opposition is always subject to change.⁵¹ Second, our institutions are well respected. Congress might war with the President but the Presidency is honored. We are now in danger of losing both these things. In large part, the matters sought to be decided by these jurisdiction-stripping bills are matters unaccompanied by a national consensus.⁵² Moreover, the bills themselves are fashioned to endanger the way Americans feel about their government and the way the branches of government feel about each other.⁵³ That is why these bills must be opposed. The Supreme Court is entitled to respect and should only be criticized when that criticism concomitantly contributes to respect, and when it serves to aid the Court in its task. It is through these means that we repay the debt that we all owe to the great institution of the Court.

⁴⁹ The framers of the Constitution intended to establish an independent judiciary as a check against constitutional abuses by the other branches. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 687 (1980). The article III assurance of this independence embraces all significant intrusions upon the exercise of the judicial power. *Id.* at 688.

⁵⁰ *Id.*; see Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1009 (1965). "[T]here are political limits on the Supreme Court's authority to bind the other branches and the States by its interpretation of the Constitution but . . . such limits are not reached without a national consensus . . ." *Id.*

⁵¹ See generally Swindler, *The Burger Court, 1969-1979: Continuity and Contrast*, 28 U. KAN. L. REV. 99 (1979). The replacement of Justices on the Court may result in a philosophically different Court majority. *Id.* at 100.

⁵² The abortion question, the subject of one of the pending jurisdiction-stripping bills, is one of the most controversial issues dividing our modern society. See J. NOONAN, *A PRIVATE CHOICE* 1 (1979); Paul & Schaap, *Abortion and the Law in 1980*, 25 N.Y.L. SCH. L. REV. 497, 498 (1980). "[T]he abortion issue reflects political, religious and economic divisions in the community." Paul & Schaap, *supra*, at 498.

⁵³ The purpose of the separation of powers concept is to assure that the acts of each branch of government "shall never be controlled by, or subjected . . . to, the coercive influence of either of the departments." *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933).